Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–283 OF 2001
MOKHTAR SIDIN, MOHD SAARI AND ALAUDDIN JJCA
25 AUGUST 2003

Contract — Guarantee — Demand for payment — Demand made after writ of summons issued — Whether proper demand made — Whether notice of demand to be issued before writ of summons filed

Contract — Guarantee — Guarantor's liability — Certificate of indebtedness — Errors manifested errors on the face of certificate — Whether guarantors bound by such certificate

Contract — Guarantee — Guarantor's liability — Liability of guarantors predicated upon a demand being made — Notice of demand issued after filing of writ of summons — Whether proper demand made — Whether guarantors liable

The respondent had granted an overdraft facility to one Sim Lim Co (M) Sdn Bhd ('the company'). The appellants were the guarantors to that facility. The liability of the appellants under the guarantee was predicated upon a demand being made by the respondent. The company defaulted in paying the outstanding amount under the facility. On 23 September 1988, the respondent issued a writ of summons and statement of claim against the company and the appellants as guarantors. However letters of demand to both appellants were only issued by letters dated 18 February 1989 (exhs ID21 and ID23) — some five months after the issue of the writ of summons and statement of claim. Judgment in default was obtained against the company on 18 December 1989. On 27 February 2001, after a trial in the High Court, judgment was entered against the appellants. They appealed to the Court of Appeal. Counsel for the appellants raised the following two issues for the Court of Appeal's determination: (i) whether a demand was in fact made against the appellants before the filing of the writ; and (ii) whether the outstanding sum due as certified in the certificate of indebtedness was correct and conclusive against the appellants notwithstanding the numerous errors in the certificate.

Held, allowing the appeal with costs:

(1) The liability of a guarantor arises only upon a demand being made. The service of a notice of demand is a prerequisite for the institution of any proceedings in respect of the claim. From the pleadings in the instant case, it was clear that the writ was filed on 23 September 1988 whereas the notices of demand (exhs ID21 and ID23) were purportedly made on 18 February 1989, ie five months after the writ was filed. There was no demand made by the respondent against the appellants before the writ of summons was filed. On the facts, the respondent failed to prove that there was a demand made against the appellants before the filing of the writ which gave rise to their liability under the guarantee.

The service of the notices of demand was a *sine qua non* for the foundation of legal liability under the guarantee. Thus, the respondent had not made out a case against the appellants (see paras 9, 13 and 17); *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 and *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 followed.

(2) A guarantor is not bound by a certificate issued under a conclusive evidence clause if he was able to show that there is a manifest error on the face of the certificate. In the instant case, it was clear from the evidence that the certificate of indebtedness contained numerous errors. It could not therefore be conclusive proof of the debts against the appellants. It was therefore invalid, null and void and could not be binding upon the appellants as guarantors (see paras 21 and 22); *Oriental Bank Bhd v Jaafar Sidek bin Mohd Salam & Ors* [1990] 2 CLJ 72 followed.

[**Bahasa Malaysia summary**

Responden telah memberi kemudahan overdraf kepada Sim Lm Co (M) Sdn Bhd ('syarikat itu'). Perayu-perayu adalah penjamin kepada kemudahan itu. Liabiliti perayu-perayu di bawah gerenti itu berdasarkan satu tuntutan yang dibuat oleh responden. Syarikat itu telah ingkar dalam membuat bayaran di bawah kemudahan itu. Pada 23 September 1988, responden telah mengeluarkan writ saman dan penyata tuntutan terhadap syarikat itu dan perayu-perayu sebagai penjamin. Walau bagaimanapun surat tuntutan kepada kedua-dua perayu hanya dikeluarkan melalui surat-surat pada 18 Februari 1989 (eks ID21 dan ID23) — kira-kira lima bulan selepas pengeluaran writ saman dan penyata tuntutan. Penghakiman ingkar telah diperoleh terhadap syarikat pada 18 Disember 1989. Pada 27 Februari 2001, selepas perbicaraan di Mahkamah Tinggi, penghakiman telah dimasukkan terhadap perayu-perayu. Perayu-perayu telah merayu kepada Mahkamah Rayuan. Peguam perayu-perayu telah membangkitkan dua isu berikut untuk penentuan Mahkamah Rayuan: (i) sama ada terdapat tuntutan terhadap perayu-perayu sebelum writ itu difailkan; dan (ii) sama ada jumlah yang masih terhutang seperti yang dinyatakan dalam perakuan keterhutangan adalah betul dan muktamad terhadap perayu-perayu walaupun terdapat banyak kesilapan di dalam perakuan itu.

Diputuskan, membenarkan rayuan dengan kos:

(1) Liabiliti seorang penjamin berbangkit hanya jika suatu tuntutan dibuat. Penyampaian notis tuntutan adalah prasyarat untuk pemulaan prosiding berkait dengan tuntutan itu. Berpandukan pliding di dalam kes ini, adalah jelas bahawa writ itu difailkan pada 23 September 1988 manakala notis tuntutan-notis tuntutan (eks ID21 dan ID23) dikatakan telah dibuat pada 18 Februari 1989, iaitu lima bulan selepas writ itu difailkan. Tiada tuntutan yang dibuat oleh responden terhadap perayu-perayu sebelum writ saman itu difailkan. Pada fakta-fakta, responden

gagal membuktikan bahawa terdapat tuntutan yang dibuat terhadap perayu-perayu sebelum writ itu difailkan yang membangkitkan liabiliti mereka di bawah gerenti itu. Penyampaian notis tuntutan-notis tuntutan itu adalah sine qua non untuk dasar liabiliti undang-undang di bawah gerenti itu. Oleh itu responden gagal membuktikan kes terhadap perayu-perayu (lihat perenggan-perenggan 9, 13 dan 17); *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 dan *Ng Hee Thoong & Ors v Public Bank Bhd* [1995] 1 MLJ 281 diikut.

(2) Penjamin tidak diikat oleh perakuan yang dikeluarkan di bawah klausa keterangan muktamad jika beliau dapat menunjukkan bahawa terdapat kesilapan yang serius pada muka perakuan itu. Di dalam kes ini, adalah jelas daripada keterangan bahawa perakuan keterhutangan mempunyai banyak kesilapan. Ia tidak mungkin menjadi bukti muktamad hutang terhadap perayu-perayu. Ia tidak sah dan batal dan tidak mengikat perayu-perayu sebagai penjamin (lihat perenggan-perenggan 21 dan 22); *Oriental Bank Bhd v Jaafar Sidek Mohd Salam & Ors* [1990] 2 CLJ 73 diikut.]

Notes

For cases on demand for payments under guarantees, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3420—3438.

For cases on guarantor's liability, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3462—3489.

For contracts of guarantees, see 16 *Halsbury's Law of Malaysia* paras [270.003] — [270.062].

Cases referred to

Lum Sow Kuen v Chuah Choong Heong & Ors [1999] MLJU 396; [1998] 4 CLJ 161 (refd)

Mok Hin Wah & Ors v United Malayan Banking Corp Bhd [1987] 2 MLJ 610 (folld)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (folld)

Oriental Bank Bhd v Jaafar Sidek Mohd Salam & Ors [1990] 2 CLJ 72 (folld)

Appeal from: Commercial Suit No D4(D9)-23-2442 of 1988 (High Court, Kuala Lumpur)

Y Thing (Lee, Ling & Partners) for the appellant.

Mabel N Jonnes (Prema Joseph with her) (Hamzah, Sulaiman & Partners) for the respondent.

Alauddin JCA (delivering judgment of the court):

[1] The appellants (the second and third defendants) are guarantors of an overdraft facility with a credit limit of RM300,000 granted by the respondent (plaintiff) to Sim Lim Co (M) Sdn Bhd (fourth defendant) pursuant to an

overdraft agreement dated 3 April 1980 (exh P1 at p 202, appeal record). The respondent had vide a letter dated 28 March 1986 (exh P2 at p 203, appeal record) to the fourth defendant renewed the credit limit of the overdraft facility to RM150,000 and granted letters of credit and bills of receivables for a credit limit of RM200,000.

[2] The appellants had on 18 April 1980 executed a joint and several guarantee (exh P6 at p 210, appeal record) which was limited to RM700,000 for all sums of money owing to the respondent on any account of the fourth defendant.

[3] The fourth defendant defaulted in paying the outstanding amount under the facilities and as a result the respondent withdrew the said facilities vide a letter dated 27 April 1988. The liability of the appellants under the guarantee is predicated upon a demand being made by the respondent in accordance with cl 15 of the guarantee.

[4] Default in repayment having occurred, the respondent issued three letters of demand to the appellants. The first letter of demand is dated 16 July 1988 (exhs P15 and P16 at p 35, appeal record). The second letter of demand is dated 17 August 1988 (exhs ID17 and ID19 at pp 36—38, appeal record). The third letter of demand is dated 18 February 1989 (exhs ID21 and ID23 at pp 36—38, appeal record).

[5] The respondent heard nothing from the appellants. So, on 23 September 1988 the respondent issued a writ accompanied by a statement of claim against the borrower and the guarantors and on 18 December 1989 the respondent obtained judgment in default of defence against the borrower (fourth defendant) for the sum of RM185,486.54 and on 27 February 2001, after a trial, judgment was entered against the appellants. Hence this appeal.

[6] In this appeal before us, learned counsel for the appellants raised two issues as follows:

(i) Has the respondent proved that a demand was made pursuant to the letter of demand dated 18 February 1989 (exhs ID21 and ID23) served by the respondent's solicitors on the appellants before the writ action in encl 1 was filed?

(ii) If the demand is proven, is it valid and is it the amount in the demand letter certified in the certificate of indebtedness (exh P10)? In other words, is the sum in the certificate of indebtedness correct and conclusive.

[7] Before we proceed to consider the issues, it would be appropriate for us at this juncture to mention that there were at least two amendments made to the respondent's statement of claim. By the first amendment which took place on 12 August 1989 the respondent added Sim Lim Co (M) Sdn Bhd ('the borrower') as the fourth defendant. At the same time the respondent deleted a letter of demand dated 17 August 1988 (exhs ID17 and ID19) against the appellants and separated two letters sent by the respondent's solicitors as follows:

(i) Letter dated 17 August 1988 (exhs ID17 and ID19) to the first defendant only;

(ii) Letter dated 18 February 1989 (exhs ID21 and ID23) to the appellants only (see para 5 of reamended statement of claim at p 59, appeal record).

[8] By another amendment in 1994, the respondent reamended para 4 of the statement of claim to delete the claims in respect of trust receipts.

[9] On the first issue, it is settled law that the liability of a guarantor arises only on demand made. The service of a notice of demand is a prerequisite for the institution of any proceedings in respect of the claim. In *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610, the then Supreme Court when faced with the same question regarding a letter of demand had this to say (at p 610):

> In our opinion, the law is very clear on this point. The respondent as creditor must prove a real demand by sending actual notice of demand to the respective guarantors.

[10] And further at p 611:

> Since bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but make the demand a condition precedent to suing the guarantor. (See also *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 and *Alliedbank (Malaysia) Bhd v Yau Jiok Hua* [1998] 6 MLJ 1).

[11] Based on these authorities we asked ourselves the question whether the respondent here has proved that the demand was made against the appellants.

[12] The respondent's action is grounded upon the appellant's failure to comply with the guarantee based on the demand made in a letter dated 18 February 1989 only (ie exhs ID21 and ID23). Based on their pleadings there is no other demand made against the appellants.

[13] From the pleadings, we would observe that the writ was filed on 23 September 1988 whereas the notices of demand (exhs ID21 and ID23) were purportedly made on 18 February 1989 ie five months after the writ was filed. In other words, there was no demand made by the respondent against the appellants before the writ of summons was filed. This is confirmed by PW1's evidence under cross-examination which reads as follows (see p 152, appeal record):

> (Refer encl 1) — It was filed on 23 September 1988. The writ was filed before letter of demand 'ID21' and 'ID23' were sent. There was a judgment entered against fourth defendant — but I don't know whether by consent or in default of appearance.

[14] For reasons best known to her learned counsel for the respondent saw it fit not to re-examine PW1 regarding the service of the letters of demand (ID21 and ID23) on the appellants (see p 152, appeal record). The second appellant ('DW1') in his evidence also confirmed that he did not receive any letter of demand from the respondent before filing of this action. His evidence was

never cross-examined (see p 159. appeal record). Thus it must be accepted that the failure to cross-examine the defendants on important aspects of their evidence must be treated as acceptance of those parts of their evidence (see *Lum Sow Kuen v Chuah Choong Heong & Ors* [1999] MLJU 396; [1998] 4 CLJ 161).

[15] In the reamended para 5 of their statement of claim the respondent had also stated that they sent a letter dated 17 August 1988 to the first defendant. We find that this letter is irrelevant to the facts in issue as it was sent to the first defendant.

[16] The respondent had also admitted sending a letter dated 16 July 1988 (exhs P15 and P16) to the second defendant and the appellants. We also consider this letter as irrelevant for the reason that it was not pleaded in the statement of claim ie the letter of demand dated 16 July 1988 is not in the pleadings.

[17] Taking into account the facts and submissions made by counsel before us in this appeal, we find that the respondent has failed to prove that there was a demand made against the appellants before the filing of the writ which gives rise to their liability under the guarantee. The service of the notices of demand is a *sine qua non* for the foundation of legal liability under the guarantee (see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281. As such we find that the respondent had not made out a case against the appellants.

[18] In dealing with this issue, in his judgment, the learned judge had failed to recognize that exhs ID21 and ID23 were letters of demand issued after the commencement of the action against the appellants. So in admitting them as relevant against the appellants the learned judge had clearly misdirected himself.

[19] We shall now move on to the second issue which relates to exh P10, the certificate of indebtedness dated 30 November 2000 (see p 216, appeal record). In his evidence at p 158, appeal record, DW1 (second appellant) in reply to questions from his counsel stated that P10 was never posted to him. He added that P10 was not correct and it was given to him 12 years after the respondent had filed the action. Once again the respondent's counsel did not cross-examine him on this point.

[20] It is also the appellant's contention that P10 is not conclusive proof of the debts against them. They claim that on the face of it P10 contains the following errors:

(a) the sum in the letter of demand (ID21 and ID23) is not stated in P10;

(b) the sum in para 5 of the reamended statement of claim is also not stated and certified in P10;

(c) there is only one overdraft account operated by Sim Lim Co (M) Sdn Bhd the principal borrower;

(d) the overdraft account No 0032 appearing in exh D25 is different from exh P10, where the account number is 100072. No explanation is rendered by the respondent for the difference in respect of these two accounts.

(e) The certificate P10 shows the amount due as at 30 November 2000 on two facilities as follows:

(i) Loan Amount: Account No 100072	
Interest at Suspense Account	RM 240,516.87
(ii) Bills Outstanding:	RM 37,556.38
Interest in Suspense Account as at 30 November 2000	RM 90,597.23
(iii) Total sum	RM 479,032.61

and interest rate is charged at 9%pa.

It was never explained by the respondent how the sum of RM185,486.54 which forms the basis of the legal claim in para 5 of the amended statement of claim can become RM479,032.61 in exh P10 ie four times the amount.

(f) The amount of RM37,556.38 in P10 itemized under Bills Outstanding — Bill No 641 – BRS – 318438 (exh P11 and Bill No 641 – BRS – 318652 (exh P13) as Trust Receipts is plainly wrong because Trust Receipts had been deleted in para 5 of the reamended statement of claim ie it does not form part of the facilities granted and guaranteed. The sum of RM37,556.38 as Trust Receipts is also proven in P7 (see p 213, appeal record).

(g) In exh P7 the respondent had specifically explained that this sum of RM37,556.38 is for the two Trust Receipt Bills. It is not for Bills of Exchange or Bills Receivables. In other words this sum of RM37,556.38 in P10 under Bills Outstanding is only for Trust Receipt ie TR. Resulting from this TR — RM37,556.38, the respondent added another sum of RM90,597.23 as interest making it a total sum of RM128,153.61 on Bills Outstanding. This is definitely wrong as it goes against the respondent's own pleadings (see para 4 of the amended statement of claim).

(h) However, in para 4 of the amended statement of claim, the respondent had deleted Trust Receipts and pleaded instead the sum of RM37,556.38 for letters of credit and Bills Receivable.

[21] From the above it is too obvious to us that exh P10, ie certificate of indebtedness, cannot be conclusive proof of the debts against the appellants. It is invalid, null and void and cannot therefore be binding upon the appellants as guarantors.

[22] In *Oriental Bank Bhd v Jaafar Sidek Mohd Salam & Ors* [1990] 2 CLJ 72, it was decided by Siti Norma Yaakob J (as she then was) that a guarantor was not bound by a certificate issued under a conclusive evidence clause if he was able to show that there was a manifest error on the face of the certificate.

[23] Under these circumstances, we find that the judge had again misdirected himself when he decided that P10 was conclusive proof of debts against the appellants.

[24] For the reasons we have already stated above, we are unanimous that this appeal should be allowed with costs.

[25] My learned brother Mokhtar Sidin JCA has seen this judgment and expressed his agreement with it. My learned brother Mohd Saari JCA has since retired.

Appeal allowed with costs.

Reported by Andrew Christopher Simon